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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 705

PETROLEUM EXPLORATION, a Maine Corporation, ... Appellant,

vs.

PUBLIC SERVICE COMMISSION OF KENTUCKY, a Kentucky Body Corporate, J. C. W. Beckham, Thomas B. McGregor and James W. Cammack, Jr., . Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR APPELLEES

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Attorney for Appellees.

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PAGE

INDEX

BLANK

PAGE

TABLE OF CASES

SECTIONS OF KENTUCKY CONSTITUTION CITED

STATUTES CITED

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PETROLEUM EXPLORATION, a Maine Corporation, - - - - - - - - - - - *Appellant,*

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PUBLIC SERVICE COMMISSION OF KENTUCKY, a Kentucky Body Corporate, J. C. W. BECKHAM, THOMAS B. McGREGOR and JAMES W. CAMMACK, JR., - - - - *Appellees.*

BRIEF FOR APPELLEES

STATEMENT OF CASE

A comprehensive statement of this case is contained in appellant's brief on pages from 2 to 10, inclusive. That statement will not be repeated herein or supplemented, except to say that the Central Kentucky Natural Gas Company, which is one of the distributing companies purchasing gas from the appellant, sells the gas which it purchases from appellant both at wholesale and retail.

SUMMARY OF ARGUMENT

1. A FEDERAL COURT IS WITHOUT JURISDICTION TO HEAR AND DETERMINE THE APPELLANT'S COMPLAINT

(a) The requisite jurisdictional amount is not involved. The matter in controversy is the right of appel-

lant to conduct its business and charge its contract prices for gas free of regulation and interference by the Commission. There is no allegation as to the value of this alleged right of appellant.

(b) Injunctive relief to appellant is prohibited by the Johnson Act.

(c) The facts and circumstances present in this case are not sufficient to cause irreparable injury to appellant or constitute a basis for equity jurisdiction. Appellant has not exhausted its administrative remedy.

2. Appellant's Business Is Not Private, But Is That of a Public Utility

(a) Appellant comes within the Kentucky statutory definition of the term "utility".

3. Appellant's Wholeale Gas Contracts With Distributing Companies Fixed Pursuant to Franchises Granted by Municipalities Are Subject to the Jurisdiction of the Commission.

(a) The Kentucky Constitution does not delegate to municipalities the exclusive authority to fix utility rates by contract.

(b) The Kentucky Statutes vests in the Commission the authority to modify and regulate utility rates fixed by contracts between utility companies and municipalities.

ARGUMENT

JURISDICTION

The appellees contend that a Federal court lacks jurisdiction of this case on the following grounds: (1) The requisite jurisdictional amount is not involved, (2) injunction is prohibited by the Johnson Act, and (3)

the required elements of equity jurisdiction are not present. We will now discuss these points in the order named.

THE REQUISITE JURISDICTIONAL AMOUNT IS NOT INVOLVED

Subsection 1, Section 14, Title 28, of the Judicial Code provides that a Federal court shall not have jurisdiction of a case of this kind unless the "matter in controversy exceeds, exclusive of interest and cost, the sum or value of $3,000". In the case of Massachusetts Protective Association v. Stephenson, 5 Fed. Supp. 568, the court, in discussing this statute, said:

> "The two words 'sum' and 'value' do not have the same significance. If they did, but one of them would have been used. 'Sum' has to do with a case where the matter in controversy is money. In such a case it is the sum of money which is in controversy that determines jurisdiction. 'Value' has to do with a case where the matter in controversy is other property or a right. In such a case it is the value of such property or right that determines jurisdiction."

In order to prove the necessary jurisdictional amount the appellant introduced testimony showing that the incidental cost of complying with the order of the Public Service Commission of Kentucky (hereinafter referred to as the Commission) would amount to a sum in excess of $20,000. The expenses to appellant incidental to complying with the Commission's order do not represent or constitute the matter in controversy in this case. There is no controversy as to such expenses. The only matter in controversy in this case is the right of appellant to conduct its business free of any regulation or interference by the Commission. There is no allegation in the appellant's bill as to the value of its right in that respect. Appellant rests its case as to the jurisdictional amount on

the expenses which it will incur incidental to complying with the Commission's order. In the case of Brandenburg, et al. v. Doyle, 12 Fed. Supp. 342, the court said:

> "From the argument and briefs submitted, the court understands the contention of plaintiffs to be that the 'matter in controversy' is a damage or injury which they will suffer by reason of the decreased value of their real estate occasioned by restriction on their right to take, possess, etc., water fowl. It seems to me this position is untenable. Whatever damage or injury they may sustain in this respect is purely incidental or collateral to the object and purposes of the suit and cannot be taken into consideration in determining the amount in controversy."

INJUNCTION IS PROHIBITED BY THE JOHNSON ACT

That part of the Johnson Act which is pertinent to this case is quoted in appellant's brief, and may be found therein on Pages 22 and 23. It is claimed by appellant that the order of the Commission involved herein does not come within the prohibition of the Johnson Act because said order was issued without a "hearing" and not after "reasonable notice", and that the order does not affect rates.

The purpose of the Johnson Act was to prevent public utilities from delaying relief to the public with respect to reasonable charges for a utility commodity by obtaining an injunction in a Federal court, and then pursue a course of prolonged litigation. In order to effectuate the intention of the Congress in passing the Johnson Act, the Act should be liberally construed.

The Commission's order involved herein was issued without a hearing, and without any notice to the appellant. The order was and is of such a nature as to eliminate any reason or necessity for a hearing or to give the appellant any advanced notice thereof. The order con-

stitutes a preliminary step in the procedure of fixing, after a hearing, reasonable prices to be charged by appellant for gas which it sells to certain retail and wholesale gas companies operating in Kentucky. The price which the appellant charges for its gas sold as aforesaid comes clearly within the definition of the term "rate" as defined in Section 3952-1 of the Kentucky Statutes, which may be found on Page 60 of appellant's brief. In passing the Johnson Act the Congress was careful not to restrict an order coming within its provisions to one which *fixes* rates. On the contrary the Congress prescribed a broad field for an order which would come within the provisions of the Act by specifying that an order which *affects* rates should come within its provisions. The order involved herein is one which affects the rates for gas now charged by the appellant. The fact that said order affects appellant's rates is the reason why appellant is so strongly resisting the enforcement of the order. Appellees earnestly invoke the provisions of the Johnson Act as a defense to appellant's claim for an injunction.

The Required Elements of Equity Jurisdiction Are Not Present

Section 3952-13 of the Kentucky Statutes, 1936 Edition, vests the Commission with the following power:

> "The Commission may compel obedience to its lawful orders by mandamus or injunction or other proper proceedings in the Franklin Circuit Court of this Commonwealth, or any other court of competent jurisdiction."

Section 3952-44 of the Kentucky Statutes, 1936 Edition, provides for a court review of an order of the Commission. The provisions of this statute may be found on Pages 73 and 74 of appellant's brief.

It will thus be seen that appellant is accorded a sufficient procedural remedy in the courts of Kentucky for protection of its claimed rights. Appellant has not availed itself of the prsescribed remedy. It pleads expenses and possible penalties as a justification for not pursuing the prescribed remedy. If appellant is correct in its contention that the order of the Commission is invalid, the appellant may ignore the order and compel the Commission to institute mandamus proceedings. Appellant then could set up its defense and have its rights adjudicated with the right of appeal to this Court.

Appellees contend that under these circumstances there is no such irreparable injury involved as to constitute a sufficient basis for equity jurisdiction.

In the case of Bradley Lumber Co., et al. v. National Labor Relations Board, 84 F. (2d) 97, the appellants sought to enjoin the appellee from conducting a hearing as to certain alleged practices of the appellants. It was contended by appellants that the Board was proceeding illegally, and that the hearing would involve considerable expense and loss of business to appellants. In denying appellants injunctive relief, the court said:

> "The appellants can have a recognition of all their just rights under the scheme of procedure set up by the act. Even in advance of a final order by the Board, jurisdiction can regularly be brought under judicial scrutiny, because no subpoena can be enforced nor any document or book be compelled to be produced, nor any other order enforced save by appeal to a court, which would then and there refuse to sanction or aid any clear usurpation. A bona fide resistance in such matters in order to secure a court test would not in our opinion come within the penal provisions of section 12 of the act (29 U. S. C. A. Section 162) as being a willful impeding, resisting, or interfering with the Board or its agents in the performance of their duties. No doubt an investigation may, as the bill asserts, stir up some feeling

among employees and cause some inconvenience by taking witnesses from their work, but these things are incident to every sort of trial and are part of the social burden of living under government. They are not the irreparable damage which equity will interfere to prevent; and a suit in equity would not wholly obviate them."

Another case similar to the one above is that of Clark, et al. v. Lindemann & Hoverson Co., et al., and other related cases, 88 F. (2d) 59, wherein the court said:

"The contention is made in all of the cases that the employers are engaged solely in intrastate commerce and that, therefore, the Act either does not apply to them or, if it does, it is unconstitutional. Conceding that such contentions are well founded, we think that an adequate forum has been provided by the terms of the Act for presentation and determination of these questions. That the parties may be subjected to expense, annoyance, and inconvenience is no adequate reason for invoking the aid of equity, as expense, annoyance, and inconvenience are present in some degree in all litigation; they are but incidental and burdens of civilized government."

Another case arising under the National Labor Relations Act is that of Elliott v. El Paso Electric Company, 88 F. (2d) 505. In that case injunctive relief was requested against a threatened investigation. In denying the relief, for want of equity, the court said:

"The investigation by the Board may cause some expense and inconvenience, but it is not the irreparable damage which equity will interfere to prevent."

A case very similar to the instant case is that of Myers v. Bethlehem Shipbuilding Corp., decided during the current term of this Court. The case has not been published in permanent form, but appears in the Lawyer's Edition, Advance Opinions of the United States

Supreme Court, Volume 82, at Page 399. In that case this Court said:

> "The Corporation contends that since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board. So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.
>
> "Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Law suits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

Other cases holding that grounds similar to those existing in the instant case are not sufficient for equity jurisdiction are Dalton Adding Machine Co. v. State Corporation Commission, 236 U. S. 699; Richmond Hosiery Mills v. Camp, 74 F. (2d) 200, and Heller Bros. Co. v. Lind, 86 F. (2d) 862.

Appellant contends that the order in question is void. The lower court held that if such contention is correct, then the appellant may safely ignore the order,

and if the Commission should proceed against the appellant by mandamus or otherwise, the appellant then could establish the invalidity of the order. In support of that conclusion the lower court cited the cases of State Corporation Commission of Kansas, et al. v. Wichita Gas Co., 290 U. S. 561, and Federal Trade Commission v. Claire Co., 274 U. S. 160. Another case in point is that of Columbia Railway Gas & Electric Co. v. Blease, et al., 42 F. (2d) 463, which was a proceeding to enjoin the Railroad Commission of South Carolina from putting into operation a certain rate order. In refusing the motion for a restraining order, the court said:

> "In addition to this, there is grave doubt in my mind as to whether the plaintiff has shown that any irreparable injury will result from a refusal to issue the restraining order. It would appear from the statutes cited that, in case of a refusal to obey the order, the only remedies for its enforcement are a penalty of $500 (section 4819, Code of South Carolina, 1922, vol. 3) and by mandamus and contempt proceedings (section 4888, Code of South Carolina, 1922, vol. 3). If these are the only remedies, the plaintiff could assert its rights in an action brought for the penalty and also in the action of mandamus, and there would be no necessity for a resort to equity and an injunction."

MERITS

Appellant contends that the Commission is without authority and jurisdiction to investigate the reasonableness of the appellant's rates because (1) appellant's business is private, and (2) appellant's purchasers of gas in turn sell and distribute the same to the public at rates fixed by franchise contracts between said purchasers and certain municipalities which are not subject to the Commission's jurisdiction. These points will now be discussed in the order named.

Appellant's Business Is Not Private

The question as to whether appellant is engaged in a private business has heretofore been answered by the Court of Appeals of Kentucky in the case of State Tax Commission v. Petroleum Exploration, 253 Ky. 119, 68 S. W. (2d) 777. In that case, as in this case, the appellant herein contended that its business was private. The Court answered that contention by saying:

> "Manifestly the case is not one where appellee is engaged in a private business. That would be true if it merely piped its own gas from its gas fields for its own use or for the sole use of a particular corporation, but that is not the case. Its pipe line is the connecting link between the gas fields and the public. Without this service the gas would not be available to the inhabitants of the four towns. In short, its business is the transportation of gas for ultimate consumption by the public, and, according to the weight of authority, it is performing a public service and has the power of eminent domain, although it does not sell directly to the consumers, but sells to others, who in turn sell and distribute the gas to the public."

The nature of the appellant's business today is the same as it was when the Court of Appeals of Kentucky characterized it as above quoted. However, the principal question for determination herein is whether appellant is a "public utility" within the meaning of that term as defined by the Kentucky Legislature, and contained in Section 3952-1 of the Kentucky Statutes, as follows:

> "The term 'utility' or 'utilities', when used in this Act, shall mean and include persons and corporations or their lessees, trustees or receivers that now or may hereafter, own, control, operate or manage * * * (two) any facility used or to be used for or in connection with the production, manufacture, stor-

age, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of same, for light, heat, power or other uses; (three) any facility used or to be used for or in connection with the transporting or conveying of gas, crude oil or other fluid substance by pipe line to or for the public for compensation; * * *."

In determining whether the appellant is a "public utility" within the meaning of the above statutory definition of that term consideration must be given to the meaning of the prepositions "to" and "for" as used in the statute.

In Webster's New International Dictionary the word "to" is defined:

"Primarily *to* denotes the relation of approach and arrival, making its governed word denote the terminus. It indicates that toward which there is movement and at which there is arrival. Hence, it indicates anything regarded as a terminal point or limit in the direction of which, or as far as which, there is movement, continuance, action, etc."

By the same authority the word "for" is defined:

"In the most general sense, indicating that in consideration of which, in view of which, or with reference to which, anything is, is done, or takes place. Indicating the end with reference to which anything is, acts, serves, or is done."

In the Century Dictionary "for" is defined:

"In the direction of; toward; with a view of reaching. With reference to the needs, purposes or uses of. Appropriate or adapted to; suitable to the purpose, requirement, character or state of."

The Kentucky Public Service Commission Act, defining the word "utility" as above quoted, was enacted by the Legislature in 1934 and became effective June 14, 1934. It must be considered that in drafting a definition of the word "utility" the members of the Legislature took cognizance of the general practice of gas companies then existing with respect to the transmission and distribution of natural gas for use by the public. It is a matter of general knowledge that natural gas companies do not transmit and distribute gas *for* the public in the sense that the gas belongs to the public. Ordinarily the public does not purchase or own gas, but merely pays a gas utility company a certain rate for the amount of gas actually used or consumed. A member of the public who is a customer of a gas utility company is permitted and expected to use or consume as much of the company's gas as he desires. The gas remains the property of the company until actually used by the consumer. The amount of gas used by the consumer is measured by a meter, and the company is compensated therefor at a fixed rate. As this was the practice and arrangement of gas utility companies with the public at the time said Act was passed, which practice was then known to the members of the Legislature, and as the members of the Legislature deliberately used the word "for", as above indicated, it must be presumed that the members of the Legislature intended that said word should be construed to mean something other than the transportation or transmission of gas belonging to the public by a gas or pipe line company. Apparently the Legislature used the word "for" to mean the transportation or transmission of natural gas intended to be used or consumed by the public. It is reasonable to say that such gas is for the public and is being transmitted to the public. Giving this interpretation and construction to the words "to" and

"for" the appellant herein is a public utility company and is subject to the jurisidction of the Commission.

The appellant contends that public service companies which sell their commodities only at wholesale are not within the definition of "utility" as contained in the Kentucky Public Service Commission Act. This question has not been determined by the courts of Kentucky. In other jurisdictions such public service companies have been held to be subject to regulation as public utilities.

Salisbury & S. Ry. Co. v. Southern Power Co., 101 S. E. 593;

North Carolina Public Service Co. v. Southern Power Company, 282 Fed. 837;

Southern Oklahoma Power Co. v. Corporation Commission, 220 Pac. 370.

The last one of these cases involves the construction of a state statute similar in language to the Kentucky statute involved herein, and also the application to that statute of a set of facts very similar to the set of facts involved in this case. The case arose in the state of Oklahoma and under the laws of that state. The definition of "public utility" contained in the Oklahoma statute reads as follows:

> "The term 'public utility', as used in this act, shall be taken to mean and include every corporation, association, company, individuals, their assigns, except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public. * * * (c) For the production, transmission, delivery or furnishing electric current for light, heat or power."

The issue involved in the case as stated by the court was as follows:

> "The question for determination is whether a plant engaged in the manufacture of electric energy which it furnishes under contract at the switchboard in its plant to a public utility which is engaged in the business of transmitting and distributing current to various cities of the state is a public utility, and, as such, subject to control by the corporation commission of this state."

In deciding the question involved in the case the court said:

> "It is our opinion that the statutory definition of a public utility is sufficiently broad to include a plant operated as the plant of the plaintiff in error, where it generates electricity and furnishes same under a contract to a public utility for distribution to the public. This corporation operates a plant which furnishes and supplies a commodity (electric energy) to be furnished to the public for the production of electric current for light, heat, and power. The statute does not require that the corporation furnish the commodity to the public, but, if it furnishes a commodity for the purpose of that commodity being delivered to the public for the production of light, heat, or power, it comes within the statutory definition."

The appellant herein uses its pipe lines in connection with the furnishing, transporting and conveying of gas to and for the public. There is a continuous flow of gas from the wells to the consuming public. This flow is partially through the pipes of the appellant. When the gas is being transmitted through the appellant's pipes its known and intended designation is the public. Such an operation comes within the broad statutory definition of the word "utility".

FRANCHISE CONTRACT RATES BETWEEN APPELLANT'S PURCHASERS AND CERTAIN MUNICIPALITIES

Appellant further contends that the appellees are without right to investigate or regulate its rates because any reduction thereof made by the appellees could not be passed on to the consuming public for the reason that appellant's purchasers of gas sell and distribute the gas to the public at rates fixed in franchise contracts between said purchasers and certain municipalities. In making this contention the appellant takes the position that the rates fixed in said franchise contracts are not subject to the jurisdiction or regulation by the Public Service Commission for the reason that Section 3952-27 of the Kentucky Statutes is invalid, as being in violation of Sections 163 and 164 of the Kentucky Constitution. Statute 3952-27 is set forth in appellant's brief on Page 70. Sections 163 and 164 of the Constitution are set forth in appellant's brief on Page 38. Said statute and said sections of the Constitution will not be repeated here.

According to the great weight of authority the general principal of law is that a contract betwen a municipality and a public service corporation fixing rates of a public utility service is subject to state legislative regulation and modification.

Springfield Consolidated Water Co. v. City of Philadelphia, 131 Atlanta 716;

Fink v. City of Clarendon, 282 S. W. 912;

State v. Latshaw, 30 S. W. (2d) 105;

Huntington Water Corporation v. City of Huntington, 177 S. E. 290;

City of Benwood v. Public Service Commission, 83 S. E. 295;

Niagara, Lockport & O. P. Co. v. Seneca I. & S. Co., 219 N. Y. S. 418;

Pawhuska v. Pawhuska Oil Co., 250 U. S. 394.

In the case of Niagara, Lockport & O. P. Co. v. Seneca I. & S. Co., supra, the court used the following language:

> "There is no longer any doubt the power of the state, through its proper agencies, to increase or lower the rates to be charged by a public service corporation, notwithstanding the existence of a contract providing for a less or a higher rate, and that the exercise of this power does not violate the federal or state Constitution."

This principle of law applies to contracts entered into prior to the enactment of state legislation providing for the regulation of the rates fixed in such contracts. In the case of City of Benwood v. Public Service Commission, supra, the following excerpts are taken from the court's opinion:

> "The case presents squarely the question: May the Public Service Commission alter a rate that was fixed by franchise ordinance prior to the enactment of the law by which the commission was created and given powers?
>
> * * *
>
> "From the general powers to establish water works and to contract and be contracted with, impliedly the city had the power to contract in the matter of rates for water furnished the public as long as the Legislature did not exercise its reserved power in that particular. But that implied power was inferior to the reserved power. It was subject to the right of the Legislature to prescribe different rates at any time. The Legislature, not having expressly delegated to the city power by which it could inviolably agree as to the rates, could exercise power in that particular regardless of the franchise provisions. It had withheld supreme power unto itself. Neither by charter nor by subsequent legislation did it delegate to the City of Benwood authority to agree unalterably as to the rates for a stipulated period.

"The water company and the city in the making of the so-called franchise contract were bound by cognizance of the fact that their dealings were subject to future exercise of the Legislature's power over rates for water furnished the public in the locality. Hence the franchise was made subject to what the Legislature might thereafter do as to the rates dealt with by the franchise. It was subject to the Legislature's making use of the inherent power, reserved and not exclusively delegated to the City of Benwood, to supervise all public service charges. And when the Legislature in its wisdom saw fit to exercise its reserved power of supervision over the matter of public service rates by the creation of the Public Service Commission and the delegation of the power to the commission in that behalf, the rates mentioned in the franchise became subject to supervision and regulation by the Public Service Commission.

* * *

"Yet it is most earnestly insisted on behalf of the city that the contract is inviolable, and that to uphold the powers of the Public Service Commission to the extent of allowing the commission to change the rates would in effect abrogate the contract, contrary to the constitutional inhibitions against the enactment of any law impairing the obligation of a contract. In the light of what we have said, this position cannot be sustained. Nothing that was binding in the contract will be impaired. By it the State was not bound. The contract related to a subject matter belonging to the State. The State had not given the city the power or agency to contract away its right thereto for a given time. The contract having been entered into without express legislative authority, was permissive only. It was conditioned upon the exercise of the sovereign power over the subject matter. All this the parties to the contract were bound to know when they entered into it. There can be no impairment of the contract by the act of the State in claiming its own, when it was not bound by the contract. The supervision and regulation of the rates by the State, through the

> Public Service Commission, does not take from either of the parties to the contract any right which they had thereunder. Such supervision and regulation does not therefore impair the obligation of a contract."

An examination of Section 164 of the Kentucky Constitution will disclose that any grant therein to a municipality to fix or regulate utility rates is only by implication. Any such authority which is thus granted to a municipality is permissive only and not exclusive. The Kentucky Legislature possesses all powers and authority not prohibited to it by the Constitution. Therefore, any power or authority which is not exclusively granted to cities by Section 164 of the Constitution is reserved to the people, and may be exercised by them through the Legislature. In this connection consideration should be given to Sections 3 and 4 of the Kentucky Constitution. Section 3 provides in part as follows:

> "* * * and every grant of a franchise privilege or exemption, shall remain subject to revocation, alteration or amendment."

Section 4 provides in part as follows:

> "All power is inherent in the people; and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property."

The delegation to municipalities of the exclusive power to fix and regulate utility service rates must be by express terms which are free of any doubt. Thus in the case of Home Telephone Co. v. Los Angeles, 211 U. S. 265, this Court said:

> "It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be

> charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. * * * But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear and all doubts must be resolved in favor of the continuance of the power. * * * It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves, may, through their relation with other facts, turn the balance one way or the other."

This same principle of law is announced by the court in the case of City of Richmond v. Chesapeake & Potomac Telephone Company, 105 S. E. 127. In that case the court said:

> "Where express power to fix telephone rates is not given a municipality, it is subject to the general law passed pursuant to the Constitution, and the constitutionally created commission may be authorized by statute to revise rates established by a municipal franchise conferred on a telephone company. The state may direct the company to raise its rates above those fixed by the franchise, if it is necessary to secure effective service, and so far as the city is concerned there is no constitutional objection on the ground of impairment of a contract obligation."

The case of Sambor v. Philadelphia Rapid Transit Co., 27 Fed. (2d) 406, is very similar in principle to the question now under consideration in the instant case. In that case the Federal District Court said:

> "There is no impairment of the obligation of a contract when it is carried out in accordance with

its terms and the contract there was read (as the present contract has been read by the state courts) as including among its terms that it was subject to the exercise of a police power of the state. There are two provisions of the Constitution of Pennsylvania, each of which in verbiage confers an absolute power. One grants to municipalities the power to consent or refuse to railway companies permission to occupy streets; the other reserves to the state the exercise, through the Legislature, of its police powers. If there is conflict between the two, some one must declare the true meaning of the Constitution in respect to which of these provisions is dominant and controlling. It must be that this meaning is to be declared by the courts, and, as the meaning to be found is that of a state Constitution, it must be found by the courts of the state. The courts of Pennsylvania have ruled that the meaning of the state Constitution is that every transaction and every contract, the law of which is the law of the state, has incorporated in it that it is subject to the exercise of the police power of the state.

"As the contract before us thus contains this provision, it follows that the enforcement of this provision of the contract is no impairment of its obligation and that the quoted clause of the national Constitution has in further consequence no application, and the bill should be dismissed, with costs, for want of equity."

What have the courts of Kentucky said with respect to the powers of municipalities under Section 164 of the State Constitution? In the case of Kentucky Utilities Co. v. Board of Commissioners, 254 Ky. 527, 71 S. W. (2d) 1024, the Court of Appeals of Kentucky held that the provisions of Sections 163 and 164 of the Kentucky Constitution do not strip the Legislature of all power and authority relative to the matters mentioned therein. Also in the case of Southern Bell Telephone and Telegraph Co. v. City of Louisville, 265 Ky. 286, 96 S. W.

(2d) 695, the Court of Appeals of Kentucky, in speaking on this subject said:

> "Section 163 merely prohibits a telephone company from erecting its poles or other apparatus along, over, under, or across the streets, alleys, or public grounds of a city without first obtaining the consent of the proper legislative body of such city. Section 164 provides that no city shall grant a franchise or privilege for a term exceeding 20 years, and requires it to receive bids therefor publicly, after due advertisement, and to award same to the highest and best bidder. It provides for restrictions on a municipality in granting a franchise or privilege, though it has been held that by implication power is conferred upon a municipality to contract with the public utility at the time the franchise is granted. The power conferred upon municipalities to enter into contracts fixing rates in the first instance for public utility service does not deprive the state of its right to exercise its police power of regulating rates. The authority to regulate rates of public utilities is primarily a legislative function of the state, and the right is essentially a police power. * * * I find nothing in Section 164 of the Constitution indicating that the state has been deprived of the right to exercise this power, and, that being true, a franchise granted by a municipality is granted subject to the right of the state to exercise its police power in this respect. A municipality may be granted the power to make irrevocable contracts as to rates and the exclusive power of regulation either by constitutional provision or legislative enactment, but the presumption that such a surrender of power has been made will not be indulged unless the grant is expressed in clear and unmistakable language or is necessarily implied from the powers expressly granted."

Appellant contends, however, that this statement of the Court of Appeals of Kentucky is dictum, and that the question involved herein has not been presented to the

Kentucky court. If that be true, then this Court should decide the question in accordance with the case of R. R. Commission, et al. v. Los Angeles R. Corp., 280 U. S. 145, wherein it was said:

> "Our attention has not been called to any California decision, and we think there is none, which decides that the state legislature has empowered Los Angeles to establish rates by contract. This Court is therefore required to construe the state laws on which appellants rely. As it is in the public interest that all doubts be resolved in favor of the right of the State from time to time to prescribe rates, a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end. The delegation of authority to give up or suspend the power of rate regulation will not be found more readily than would an intention on the part of the State to authorize the bargaining away of its power to tax."

The constitutionality of the Public Service Commission Act of Kentucky was upheld by the Court of Appeals of Kentucky in the case of Southern Bell Telephone and Telegraph Co. v. City of Louisville, supra, and in the case of Smith v. Southern Bell Telephone & Telegraph Co., 268 Ky. 421, 104 S. W. (2d) 961.

In view of the foregoing authorities it seems that there can be no doubt that the Kentucky Public Service Commission has jurisdiction of and possesses the power and authority to regulate the rates for gas provided for in franchise contracts. The municipalities have the right to fix the initial rates by franchise contracts. Even an individual consumer has the right to contract with a utility company for a particular rate. In both cases, however, the rate or rates thus fixed are subject to regulation by the said Commission. The rate or rates remain binding on the parties to the contracts until changed by the Commission.

However, the distributing companies which purchase gas from complainant are entitled to obtain their gas from complainant at reasonable rates, irrespective of the right of the Public Service Commission to regulate rates fixed by franchise contracts. Carey v. Corporation Commission, 33 P. (2d) 788, is a case directly in point. It was contended in that case that the wholesale gas company's rates were not subject to regulation by the state agency because any reduction in rates could not be passed on to the consumers. The facts with respect to that point and the decision of the court thereon are stated in the opinion as follows:

> "Each of these towns operates its own gas distributing system, and buys its gas from the company at its city limits. This gas is purchased under a written contract (separate for each town) specifying the charges and has several years to run. Each town petitioned for a reduction in gate rate charges despite the contracts. These petitions were heard, and upon complete hearing, the rates were found to be excessive, and ordered reduced accordingly.
>
> "The first proposition argued by Company is want of jurisdiction of the commission over these parties for the purpose of regulating directly or indirectly the rates or charges affecting a municipally owned and operated public utility. It is asserted that the corporation commission is not given the authority to regulate the affairs of a municipally owned and operated public utility, in so far as its rates, services, etc., are concerned within its city limits, and therefore it is no concern of the corporation commission what it pays for its gas supply. It is further argued, admitting for the sake of argument the commission has such power, that each situation must show the existence of a status affected with a public interest to justify the interposition of the paramount authority of the corporation commission as regards the contracts by which a municipality purchases a commodity to be dispensed by its utility plant; and because the corporation commission can-

not follow reduction in gate rate cost to a municipally owned and operated public utility to its necessary ultimate designation, the consumer at the burner tip, no public interest is involved.

"We have carefully considered this record and do not find in it any evidence of an attempt on the part of the corporation commission to exercise control, within the town limits, of rates, charges, services, etc., of the municipally owned and operated plants. We are therefore not called upon herein to determine whether the corporation commission can exercise supervision, regulation, and control over the rates, charges, services, etc., of a municipally owned and operated public utility as regards its patrons.

"But the towns, as owners and operators of these plants, are purchasers of gas, and if they purchase it from the public service company within the definition of our Constitution, art. 9, sec. 34, and ch. 93, Sess. Laws 1913, they are entitled to the same protection and relief against overcharge and partiality on the part of the public service company as any other purchaser, be the purchaser an individual, a private corporation, public service company, or a municipality. It is because Company is a public service company, within the definition of the Constitution and laws, supra, if it is, and the towns are its patrons, then the corporation commission's authority arises.

"'* * * The record shows that Company produces, buys, transports, and sells natural gas, all within Oklahoma, by this particular line. We therefore hold that the commission had jurisdiction of this matter to regulate the rate charges of Company to these towns, in the interest of the public. Any contracts it has made regarding its services and rates must fall before the commission's proper orders."

The proceeding which the Commission has instituted against the appellant is for the purpose of determining the reasonableness of the charges which appellant makes

for gas which it sells to be used by the public, and, in the event it is found that said charges are unreasonable, to fix said charges at a reasonable amount. In the event a reduction is ordered by the Commission, the Commission will, upon the order becoming final, issue other and appropriate orders directing the purchasers of gas from appellant to reduce their rates to the public proportionally so that the public will receive the benefit of any reduction made in appellant's rates. This procedure is simple, and is commonly followed by rate regulatory bodies of the various states.

CONCLUSION

For all of the foregoing reasons it is urged that the judgment of the lower court be affirmed.

Respectfully submitted,

J W JONES,
Assistant Attorney General, of the Commonwealth of Kentucky,
Frankfort, Kentucky,
Attorney for Appellees.

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SUPREME COURT OF THE UNITED STATES.

No. 705.—October Term, 1937.

Petroleum Exploration, Inc., Appellant, *vs.* Public Service Commission of Kentucky, et al.	Appeal from the District Court of the United States for the Eastern District of Kentucky.

[May 2, 1938.]

Mr. Justice Reed delivered the opinion of the Court.

This is an appeal from a final decree dismissing appellant's bill of complaint for want of jurisdiction in equity. It was entered by the United States District Court for the Eastern District of Kentucky sitting with three judges under Judicial Code Section 266. 21 F. Supp. 254. The appellant sought to enjoin the Public Service Commission of Kentucky from prosecuting an investigation of wholesale rates for gas marketed by contract in Kentucky by appellant, on the ground that any regulation of the rates charged by appellant to its customers would be beyond the statutory power of the Commission, since the appellant was not a public utility, and would result in a deprivation of property without due process, a denial of equal protection of the laws, and a violation of the contracts clause of the Federal and State Constitutions, affecting contracts entered into prior to the passage of the regulatory act[1] of the General Assembly of Kentucky. As grounds for equitable relief, it was alleged that there was no adequate remedy and that irreparable injury would be inflicted upon appellant by the large expense entailed in preparation for the investigation.

Appellant is a corporation solely of the State of Maine, engaged in the production and purchase of natural gas at various fields in Kentucky and the transmission of that gas through wholly intrastate pipe lines to distributing agencies at the "city gates" of various municipalities of that Commonwealth. Appellant sells to three distributing agencies: a partnership, a corporation entirely free of connection with appellant, and a corporation in which ap-

[1] Acts of 1934, c. 145, as amended by Acts of 1936, c. 92.

pellant owns a dominant interest. It offers to sell and sells its commodity by separate contracts only to the distributing agencies named in the bill. All of these agencies, with one immaterial exception, are the owners of unexpired franchises purchased from the respective municipalities which they serve. Either by these franchises or by supplementary contract, the rates are fixed for retail sales of gas. Acting pursuant to statutory provisions authorizing investigations of the rates of defined utilities, the Public Service Commission of Kentucky issued on May 29, 1937, an order, pertinent provisions of which are set forth in the margin,[2] reciting that appellant is an operating utility subject to the Commission's

[2] "Notice of Investigation and Order to Show Cause

"Whereas, An examination of the reports of several wholesale and retail gas utilities serving in this state, show that they purchase gas at wholesale rates from the Petroleum Exploration, Inc., Lexington, Kentucky; and

"Whereas, The Commission has found under Sections 3952-1-12-13, and 14 that the Petroleum Exploration, Inc., is an operating utility in the State of Kentucky, and subject to the jurisdiction of this Commission; and

"Whereas, It is apparent from a comparison of these rates with those of other companies rendering a similar class of service in Kentucky that these rates may be excessive; and

"Whereas, These wholesale rates bear a definite relationship to the cost of gas to consumers in the following towns and communities, namely, Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond, Irvine-Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown; and

"Whereas, Authority to initiate this investigation is vested in the Commission by Sections 3952-12-13, and 14 of the Kentucky Statutes,

"Now, Therefore, Notice is Hereby Given, That the Commission has entered upon an investigation of the above matters and that a public hearing will be held relative to said matters at the office of the Commission on June 29, 1937, at which time and place any person interested may appear and present such evidence as may be proper in the premises; and

"Whereas, Under such circumstances the Commission finds the burden of proof upon the utility to show that rates and charges are fair and reasonable, and not arbitrary.

"Now, Therefore, it is Ordered:

"1. That official representatives of the Petroleum Exploration, Inc., appear at such hearing and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable.

[Sections 2 and 3 omitted here relate to a requirement for the submission of information on contracts between appellant and other parties. Existence of such contracts was denied by appellant, and no evidence to establish them was offered.]

"4. That all books, accounts, records, correspondence and memoranda of the Petroleum Exploration, Inc., be made available for examination by the Commission's representatives.

"Notice is Hereby Given to the Petroleum Exploration, Inc., of the above order of the Commission.

"Dated at Frankfort, Kentucky, this 29th day of May, 1937."

jurisdiction, setting a date for a public hearing, and ordering appellant to appear at such hearing and present evidence of the reasonableness of its rates and charges, and also to make its records available for examination.

Appellant filed a plea to the Commission's jurisdiction, in substance setting up the objections subsequently urged in the bill under consideration. The Commission overruled this plea and reset the investigation for hearing on the merits. The appellant filed an application for a rehearing of this order. Though the Commission has not formally passed upon this application it admits that it intended and threatened to proceed with the investigation, determine and fix a fair rate for appellant's gas, and that it would have so proceeded but for the temporary restraining order obtained by appellant upon the filing of the bill in question.

Appellant's bill alleged that it was the obvious purpose of the Commission to lower appellant's rates, that these rates were not subject to the regulatory jurisdiction of the Commission, that any reduction would violate the Fourteenth Amendment, and impair the obligations of its contracts, in contravention of the contracts clauses of the State and Federal Constitutions. It was further alleged that the investigation, and the orders entered therein, are unlawful and unreasonable, and, if further prosecuted, would put appellant to considerable unlawful and needless expense. The Commission filed an answer asserting that appellant was subject to its regulatory jurisdiction. It denied any purpose on its part to attempt to lower the contract price which appellant charged the distributing agencies but averred that it would institute and conduct a special investigation and proceeding to determine a fair and reasonable price or rate to be charged by appellant and to fix said price or rate.

The majority opinion of the District Court held that as the order challenged could be enforced only by judicial proceedings, there existed no immediately threatened irreparable injury or damage to the appellant within the equity jurisdiction of the District Court. Without any consideration of the merits, the bill was dismissed. The assignments of error attack this conclusion. We affirm the decree of the District Court.

First.—The point is made by appellees that injunction is prohibited by the Johnson Act of May 14, 1934, c. 283, § 1, 48 Stat. 775, 28 U. S. C. § 41(1). This act withdraws from the dis-

trict courts jurisdiction of any suit to enjoin the enforcement of any order of a state administrative commission where such order "(1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." The Johnson Act does not apply here because the order complained of, i. e., that of May 29, 1937, was entered without notice or hearing. Though it is entitled a "Notice of Investigation and Order to Show Cause," which would be an appropriate method of initiating an investigation, in fact the order commands appellant to produce certain evidence on a designated date, and not merely to show cause on that date why evidence should not be produced. The order of June 29, 1937, overruling the plea to the jurisdiction, is not final but is pending on an application for rehearing.

Second.—This proceeding was begun under the provisions of section 24(1) of the Judicial Code, 28 U. S. C. § 41(1). Jurisdiction was challenged by the Commission on the ground that the value of the matter in controversy was not in excess of $3,000. To show the requisite amount, appellant alleged that it would be necessary to expend $25,000 to present the evidence required by the order. It was found by the District Court from the testimony at the trial that "the expense to plaintiff of complying with said orders would be more than $3000.00 in employing appraisers, geologists, engineers, accountants, etc., to show the original and historical cost of its properties, cost of reproduction as a going concern, and other elements of value recognized by the law of the land for rate making purposes."

The purpose of this proceeding is to stop the investigation of the rates under the order issued. Since the necessary expense of producing the information demanded by the order exceeds the jurisdictional amount, the value of the matter in controversy is at least this sum. This purpose or object is analogous to those sought in injunctions to restrain a continuing trespass, where the value of the matter in controversy includes the cost of remedying the condition as part of the value of the matter in controversy, namely, the prevention of interference with plaintiff's rights.[3] Other examples are found in a

[3] Glenwood Light Co. *v.* Mutual Light Co., 239 U. S. 121, 125. The pleadings and proof in the present case do not in terms raise the question of the value of the right to conduct business free of interference by the Commission. Scott *v.* Donald, 165 U. S. 107; cf. Glenwood Light Co. *v.* Mutual Light Co., *supra*, 124.

suit to enjoin the enforcement of a tax statute, where the amount of the tax is the value of the matter in controversy,[4] and in a suit to enjoin enforcement of an order to install and maintain a track, where the value of the matter in controversy is the cost of compliance.[5] Where "expenses incident to compliance" with a regulatory statute exceed $3,000, the jurisdiction is clear.[6] There is no contention here either that the Commission's order left appellant with any less expensive alternative, or that the worth of appellant's entire business is less than $3,000. In undertaking to enjoin this investigation, the cost incident to making a showing required by the Commission is not collateral or incidental to the purpose of the injunction, but a threatened expense from which relief is sought. Whether such irrecoverable cost is an irreparable injury against which equity will protect is considered later in this opinion. The District Court had jurisdiction of the cause, as a federal court.

Third.—We next consider whether the suit must be dismissed pursuant to Section 267 of the Judicial Code, 28 U. S. C. §. 384, which declares that no suit in equity shall be sustained "where a plain, adequate, and complete remedy may be had at law." Though this contention was not raised below by the Commission, "either the trial court or the appellate may, of its own motion, take the objection."[7] For determination of the adequacy of this remedy we must here assume the allegations of appellant that, unless an injunction is granted, irreparable injury will flow from its compliance with the order of May 29.

It is settled that no adequate remedy at law exists, so as to deprive federal courts of equity jurisdiction, unless it is available in

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[4] Healy *v.* Ratta, 292 U. S. 263.

[5] Western & Atlantic R. *v.* Railroad Comm. of Georgia, 261 U. S. 264.

[6] Packard *v.* Banton, 264 U. S. 140, 142, 143.

[7] See Twist *v.* Prairie Oil & Gas Co., 274 U. S. 684, 690. Although the objection does not go to the jurisdiction of the court as a federal court and may be waived and not considered if not timely raised (Reynes *v.* Dumont, 130 U. S. 354, 395), if it be obvious that there is an adequate remedy at law, the court acts *sua sponte* to preserve the courts of equity as a forum for extraordinary relief, in accordance with the legislative direction of section 267 of the Judicial Code. Parker *v.* Winnipiseogee Lake Cotton & Woolen Co., 2 Black 545, 550; Wright *v.* Ellison, 1 Wall. 16, 22; Oelrichs *v.* Spain, 15 Wall. 211, 228; Singer Sewing Machine Co. *v.* Benedict, 229 U. S. 481, 486; Henrietta Mills *v.* Rutherford County, 281 U. S. 123, 128. Cf. Federal Trade Commission *v.* Claire Furnace Co., 274 U. S. 160. It is a question of "whether the case is one for the peculiar type of relief" granted by courts of equity. Di Giovanni *v.* Camden Ins. Assn., 296 U. S. 64, 69.

the federal courts.[8] If appellant ignores the Commission's order, action for recovery of penalties for the violation of the order may be instituted by the Commonwealth of Kentucky. Ky. Stat. Ann. (Carroll's 8th ed., Baldwin's 1936 revision) §§ 3952-13 and -61. But this proceeding could neither be begun nor removed to the federal court. Apart from the difficulty of maintaining such an action in the federal courts, in view of its penal nature, the State would be proceeding as plaintiff to enforce its laws; its complaint would not be grounded on the Constitution or laws of the United States, and there would not be diversity of citizenship, the States not being "citizens" within the Judicial Code.[9] There is equitable jurisdiction to enjoin the proposed investigation of appellant's rates, if the order of May 29, quoted above, carries a threat of imminent, irreparable injury.

Fourth.—The bill asks injunctive relief to restrain the Commission from further prosecuting the "investigation" into the price of gas sold under appellants contracts to the distributing agencies. Two decisions dealing with orders for furnishing information have recently been handed down by this Court.[10] In both cases this Court dealt with the merits of the respective orders, determining that there was no constitutional basis for saying that "any person is immune from giving information appropriate to a legislative or judicial inquiry." Here there is no need to consider the validity of the challenged order. To justify the use of the extraordinary power of a court of equity something more must be involved than an application of a statute in an unconstitutional manner against complainant. There must be an allegation and proof of threatened injury under some of the recognized sources of equitable jurisdiction.[11] The one most frequently relied upon in constitutional cases, and pleaded here, is irreparable injury.[12] To

[8] Di Giovanni *v.* Camden Ins. Assn., 296 U. S. 64, 69, and cases cited; Chicago B. & Q. R. Co. *v.* Osborne, 265 U. S. 14, 16.

[9] Postal Tel. Cable Co. *v.* Alabama, 155 U. S. 482, 487; Minnesota *v.* Northern Securities Co., 194 U. S. 48, 63; Arkansas *v.* Kansas & Texas Coal Co., 183 U. S. 185, 188; City Bank Co. *v.* Schnader, 291 U. S. 24, 29.

[10] Natural Gas Co. *v.* Slattery, 302 U. S. 300, 306; Arkansas Louisiana Gas Co. *v.* Department of Public Utilities, No. 645, October Term 1937, decided April 25, 1938.

[11] Dows *v.* Chicago, 11 Wall. 108; Cruickshank *v.* Bidwell, 176 U. S. 73, 81; McChord *v.* Louisville & Nashville R. Co., 183 U. S. 483, 495; Shelton *v.* Platt, 139 U. S. 591, 596; Boise Artesian Water Company *v.* Boise City, 213 U. S. 276, 281.

[12] See Irreparable Injury in Constitutional Cases, 46 Yale Law Journal 255 (1936).

furnish the information required by the order will cost $25,000, arising from the necessity of preparing for the hearing on rates. Is this irrecoverable expense a threatened irreparable injury which a court of equity will guard against by injunction? Whether or not equitable relief will be granted rests in the sound discretion of the court.[13]

It is true that the injury which flows from the threat of enforcement of an allegedly unconstitutional, regulatory state statute with penalties so heavy as to forbid the risk of challenge in proceedings to enforce it, has been generally recognized as irreparable and sufficient to justify an injunction.[14] The Commission urges that since there is ample opportunity for the appellant to contest in a state court any effort to regulate or punish for disobedience of orders, with ultimate review by this Court, there is no irreparable injury, and that the dangers of lowered rates and threatened punishments can be overcome by opposition when an effort is made to enforce them. The case of *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, where an effort was made to secure an injunction against enforcement of a Federal Trade Commission order to produce information, has been cited as a precedent. There were heavy penalties for violation of that order[15] but the opinion discussed the issues from the standpoint of failure to exhaust administrative remedy.[16] Appellant here insists that it is compelled to choose between compliance, at a heavy cost, or non-compliance with obvious risks of severe, though non-recurring and non-cumulative, penalties;[17] and that to stand by subjects

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[13] Di Giovanni *v.* Camden Ins. Assn., 296 U. S. 64, 70.

[14] Ex parte Young, 209 U. S. 123, 165; Terrace *v.* Thompson, 263 U. S. 197, 215, 216; Packard *v.* Banton, 264 U. S. 140, 143.

[15] Sections 9 and 10 of the Act of September 26, 1914, c. 311, 38 Stat. 722, 15 U. S. C. §§ 49, 50.

[16] Cf. Dalton Adding Machine Co. *v.* State Corporation Commission, 236 U. S. 699.

[17] Ky. Stat. Ann. § 3952-61 provides: *Penalties.*—Every officer, agent or employee of any utility as enumerated in section 1 hereof, or other person who shall willfully violate any provisions of this act, or who procures, aids or abets any violation of this act by any such utility shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand ($1,000.00) dollars, or be confined in jail not more than six (6) months, or both; and if any such utility shall be a private corporation and shall violate any of the provisions of this act, or shall do any act herein prohibited, or shall fail and refuse to perform any duty imposed upon it under this act for which no penalty has been provided by law, or who shall fail, neglect or refuse to obey any lawful requirement or order made by the com-

appellant to the further risk that the Commission will fix its rates on the Commission's evidence alone.[18] We may assume, without deciding, that the risk of these penalties would be sufficiently great to require the interposition of a court of equity to protect appellant against a regulatory order.

Compliance with this order, however, subjects appellant only to an expense in preparing for and carrying out an investigation. It is not suggested that the expense is disproportionate to the business of appellant, valued by the District Court as in excess of $1,500,000, and involving sales of about one billion cubic feet per annum, at a price of $350,000. No order has been entered fixing rates or regulating conduct. The necessity to expend for the investigation or to take the risk for non-compliance does not justify the injunction. It is not the sort of irreparable injury against which equity protects.[19]

The weight to be given complaints of irrecoverable and irreparable cost and damage in proceedings to enjoin hearings, initiated by a federal governmental agency in a matter alleged by complainants to be beyond the agency's powers, was considered in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. —, No. 181, October Term 1937, decided January 31, 1938. In an effort to enjoin hearings by the National Labor Relations Board, the Corporation alleged (see 303 U. S. at —):

"that hearings would, at best, be futile; and that the holding of them would result in irreparable damage to the Corporation, not

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mission, for every such violation, failure or refusal such utility shall forfeit and pay into the treasury a sum not less than twenty-five ($25.00) dollars, nor more than one thousand ($1,000.00) dollars, for each such offense, said sum or sums to be paid to the Treasurer and credited to the general fund. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any utility acting within the scope of his employment shall in every case be deemed to be the act, omission or failure of such utility." There is also provision for proceedings by mandamus or injunction to compel obedience to the orders of the Commission. Ky. Stat. Ann. § 3952-13.

The minority opinion below construed this as follows: "When the violator is an individual, the penalties for failure to comply with the orders of the Public Service Commission are not more than $1,000, or confinement in jail for not more than six months, or both, and if a corporation, not less than $25 or more than $1,000 for each violation, the enforcement thereof to be by the Franklin circuit court of the commonwealth of Kentucky." 21 F. Supp. 254, at 259.

The appellant argues in this Court that failure to produce the evidence may subject it to a fine and its officers and agents to criminal penalties. Neither the majority below nor the Commission in this Court expresses a contrary view.

[18] Ky. Stat. Ann. § 3952-14.

[19] Cf. Lawrence v. St. L.-S. F. Ry., 274 U. S. 588, 592.

only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the Corporation and its employees, and thus seriously impair the efficiency of its operations."

Further allegations pointed out similar substantial damages in preceding investigations. See Note 4 *idem.* While other grounds were factors in our conclusion to reverse the decree for an injunction, we said (p. —):

"Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

It may be suggested that in the *Bethlehem Shipbuilding* case the employer had not presented to the Board its contention of constitutional immunity, and that proof of that immunity would have constituted no greater injury if presented to the Board than the courts, whereas here the appellant has already been overruled by the Commission on the question of appellant's constitutional immunity, and so would be subject to greater expense by presenting further evidence on another matter before the Commission than by proceeding in an equity court and there contesting the Commission's jurisdiction. This was the argument presented to the Court, but not discussed, in *United States* v. *Illinois Central R. Co.*, 244 U. S. 82, 85-86. The situation is still controlled by the abiding and fundamental principle of this aspect of the *Bethlehem Shipbuilding* case, that the expense and annoyance of litigation is "part of the social burden of living under government."[20] The authority in other courts is in accord.[21]

Fifth.—Our conclusion that this is not a threatened injury justifying intervention is strengthened by a balancing of conveniences. By the process of injunction the federal courts are

[20] Bradley Lumber Co. *v.* N. L. R. B., 84 F. (2d) 97, 100 (C. C. A. 5). Whether expense, in this instance, may be avoided by a challenge of the interlocutory orders of the Commission on the plea of appellant to the jurisdiction (see Ky. Stat. Ann. § 3952-44), is not within our province to decide.

[21] The suggestion that an administrative agency be enjoined from further, and expensive, proceedings after its allegedly erroneous determination of jurisdiction was considered and rejected in Chamber of Commerce *v.* Federal Trade Commission, 280 Fed. 45, 48-49 (C. C. A. 8); Pittsburgh & W. Va. Ry. Co. *v.* Interstate Commerce Commission, 280 Fed. 1014, 1015-6 (App. D. C.); Paramino Lumber Co. *v.* Marshall, 18 F. Supp. 645, 647 (D. Wash.). Compare State ex rel. Carrau *v.* Superior Court, 30 Wash. 700; Edward Hines Yellow Pine Trustees *v.* Knox, 144 Miss. 560, 572-573.

asked to step at the threshold, the effort of the Public Service Commission of Kentucky to investigate matters entrusted to its care by a statute of that Commonwealth obviously within the bounds of state authority in many of its provisions. The preservation of the autonomy of the states is fundamental in our constitutional system. The extraordinary powers of injunction should be employed to interfere with the action of the state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant.[22] "Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state."[23] The Kentucky statute in question contains detailed provisions for hearings and judicial review.[24] These include notice, procedural rules before the Commission, right to counsel, production of evidence, service of orders, rehearing, process for parties and witnesses, depositions, record of proceedings, review of orders by court and appeal to the state court of last resort. The compulsory and punitive powers of the Commission are exercised through judicial process. When the only ground for interfering with the state procedure is the cost of preparing for a hearing, there is no occasion for equitable intervention.

Affirmed.

Mr. Justice McREYNOLDS concurs in the result.

Mr. Justice STONE concurs, except that he expresses no opinion on the applicability of the Johnson Act.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[22] Gilchrist *v.* Interborough Co., 279 U. S. 159, 207; Pennsylvania *v.* Williams, 294 U. S. 176, 185; Matthews *v.* Rodgers, 284 U. S. 521, 525; cf. Harrisonville *v.* Dickey Clay Co., 289 U. S. 334, 338.

[23] Hawks *v.* Hamill, 288 U. S. 52, 61.

[24] Ky. Stat. Ann. §§ 3952-33 to -51 inclusive.